In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NORTH AMERICAN COMMERCIAL Company, plaintiff in error,
v.
THE UNITED STATES, DEFENDANT in error.

No. 431.

APPLICATION UNDER SECTION 6 OF THE ACT OF MARCH 3, 1891, AND RULE 37, SUBDIVISION 2, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES FOR AN ORDER THAT THE WHOLE RECORD AND CAUSE BE SENT UP TO THIS COURT FOR CONSIDERATION IN A CAUSE IN WHICH ONE QUESTION HAS BEEN CERTIFIED TO THIS COURT BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT; AND MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully prays that a writ issue to the United States circuit court of appeals for the second circuit to require the whole record and cause in the above-entitled case to be certified and sent up to this court for review and determination, pursuant to the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals," etc., approved March 3, 1891.

A question arising in the cause has been certified to this court by the circuit court of appeals for the second circuit under the following clause of section 6 of said act:

> Except that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instructions of that Court for its proper decision.

The present application is made under the next succeeding clause of said act, reading:

> And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The cause in question is an action at law, in which judgment was rendered for the United States, the original plaintiffs, in the United States circuit court for the southern district of New York, for $107,257.29. A counterclaim interposed by defendant, plaintiff in error, was disallowed. The case was tried in the circuit court without a jury, under sections 649 and 700 of the United States Revised Statutes, and findings of fact and conclusions of law duly made and filed. It was taken to the circuit court of appeals for the second circuit by the North American Commercial Company, by writ of error, was argued there on May 10, 1897, and on July 21,

1897, a question relative to the counterclaim was certified to this court by the circuit court of appeals.

The certificate of the circuit court of appeals is printed as an appendix hereto.

STATEMENT OF FACTS.

On the 12th day of March, 1890, the United States by William Windom, Secretary of the Treasury, leased to the North American Commercial Company for twenty years from the 1st day of May, 1890, "*the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.*" The lessee agreed:

> To pay to the Treasurer of the United States each year during the said term of twenty years, as *annual rental*, the sum of sixty thousand dollars; and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay to the said Treasurer the further sum of seven dollars sixty-two and a half cents apiece for each and every fur-seal skin taken and shipped from said islands. (R., Third Finding, fol. 116.)

By the terms of the lease these payments became due and payable on or before the 1st day of April of each and every year during the existence of the lease. The complaint alleged that the defendant, during the year 1893, took and shipped, pursuant to the lease, 7,500 fur-seal skins from the islands, and that, therefore, on the

1st day of April, 1894, pursuant to the terms of the lease, there was due and payable from the defendant:

As annual rental	$60,000.00
Revenue tax, 7,500 fur-seal skins taken and shipped, at $2	15,000.00
7,500 fur-seal skins at $7.62½ apiece	57,187.50
Amounting in all to the total sum of	132,187.50

Upon this sum interest was claimed from April 1, 1894. (R., fol. 18.)

The defendant having failed to pay this amount on demand, this action was brought to recover the same.

This action is one of a series of actions brought by the United States against the defendant corporation arising from the divergent views of the parties in respect to the construction of the lease and the statutes pursuant to which the lease was made as affecting the amount of the payments annually due under the lease to the United States.

The actions now pending are:

(1) The present action for rentals, royalties, and taxes due April 1, 1894, now pending in the circuit court of appeals and the subject of the present application. Amount of judgment	$107,257.29
(2) For rentals, royalties, and taxes due April 1, 1895.	214,298.37
(3) For rentals, royalties, and taxes due April 1, 1896.	204,375.00
(4) For rentals, royalties, and taxes due April 1, 1897.	348,750.00
Total	874,680.66

The amounts stated in actions 2, 3, and 4 are exclusive of interest. The total principal and interest already largely exceeds $900,000.

It will appear that until the questions involved in this action are settled a new action will undoubtedly be com-

menced every year for the rentals, royalties, and taxes due to the United States from the North American Commercial Company on April 1 of each and every year during the term of the lease, which does not expire until May 1, 1910. In the meantime the United States are deprived entirely of revenue from the Pribilof Islands, and the circuit court will not permit any of the subsequent actions to be tried while the present action, involving all the important questions, is pending on appeal, the final decision of which will in all probability finally determine the entire controversy.

It appears that the islands of St. George and St. Paul, mentioned in the lease, became possessions of the United States by the Alaska cession from Russia in 1868. In 1870 Congress passed the act of July 1, 1870, chapter 189 (16 Stat. L., 180), entitled "An act to prevent the extermination of fur-bearing animals in Alaska." This act provided that the privilege of taking fur seals on these islands should be leased to responsible parties by the Secretary of the Treasury for a period not less than twenty years, and that, on the expiration of that lease, other leases for a period of twenty years should be made.

The islands were made a Government reservation, and strict provisions of law were enacted to secure to the lessee the privileges made the subject of the lease and to preserve the fur-seal fishery. In 1874 this act and certain earlier statutes were incorporated in the Revised Statutes as chapter 3 of Title XXIII, sections 1954–1976.

The first lease was made under the act of July 1, 1870, to the Alaska Commercial Company, and was dated as

of May 1, 1870. On the expiration or surrender of that lease the present lease, dated May 1, 1890, was made to the North American Commercial Company. The present lease recites that it is made "in pursuance of chapter 3 of Title XXIII, Revised Statutes." (R., fol. 115.)

The evidence shows that prior to 1890, probably by reason of what is known as open-sea or pelagic sealing, the seals on the islands were rapidly diminishing in numbers.

As a result of the rapid and startling depletion of the fur seals on the islands, an agreement was entered into with Great Britain, known as a *modus vivendi*, first proclaimed by the President on June 15, 1891 (27 Stat. L., 980). By this agreement the President, on behalf of the United States, agreed to prohibit the killing of fur seals by citizens of the United States in Bering Sea and upon the islands of St. George and St. Paul, "except 7,500 to be taken on the islands for the subsistence and care of the natives." Great Britain, on its part, agreed to prohibit fur sealing by subjects of Great Britain in Bering Sea during the continuance of the *modus*.

This *modus vivendi* was by its terms to last one year. An arbitration agreement, however, had not been effected at the expiration of that year, but in May, 1892, the United States and Great Britain agreed upon a convention to arbitrate their differences in Bering Sea arising out of the efforts of the United States to preserve the fur seals. As that convention contemplated an arbitration which would necessarily occupy some time, another *modus vivendi* was entered into of the same date, May 9, 1892. (27 Stat. L., p. 952.)

This was ratified by the Senate on April 19, 1892, and proclaimed on May 9 of that year. It continued until the fall of 1893. This *modus* describes itself in the preamble as a "*restrictive regulation for seal hunting*" during the pendency of such arbitration. It was a renewal of the *modus vivendi* of the year 1891. There is this difference between it and the *modus* of 1891—namely, that the first *modus* was never ratified by the Senate, while the second *modus* was ratified by the Senate and became a treaty.

THE STATUTES AFFECTING THE CASE.

Section 3 of the act of July 1, 1870 (16 Stat. L., 180), provides as follows:

> SEC. 3. *And be it further enacted*, That for the period of twenty years from and after the passage of this act the number of fur seals which may be killed for their skins upon the island of Saint Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of Saint George is hereby limited and restricted to twenty-five thousand per annum: *Provided*, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section he shall, upon due conviction thereof, be punished in the same way as provided herein for the violation of the provisions of the first and second sections of this act.

This section was incorporated in Revised Statutes, 1962, which is as follows:

> SEC. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of Saint Paul is limited to seventy-five thousand per annum and the number of fur seals which may be killed for their skins upon the island of Saint George is limited to twenty-five thousand per annum, but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper, and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.
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> SEC. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

Section 4 of the act of July 1, 1870 (16 Stat. L., 180), is as follows:

> SEC. 4. *And be it further enacted*, That immediately after the passage of this act the Secretary of the Treasury shall lease, for the rental mentioned in section six of this act, to proper and responsible parties, to the best advantage of the United States,

having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade and the protection of the seal fisheries, for a term of twenty years from the first day of May, eighteen hundred and seventy, the right to engage in the business of taking fur seals on the islands of Saint Paul and Saint George, and to send a vessel or vessels to said islands for the skin of such seals, giving to the lessee or lessees of said islands a lease duly executed, in duplicate not transferable, and taking from the lessee or lessees of said islands a bond, with sufficient sureties, in a sum not less than five hundred thousand dollars, conditional for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith. And in making said lease, the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance and education of the natives thereof. The said lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue officers for the time being who may be in charge at the said islands as the authority of the party for landing and taking skins.

This section of the act of July 1, 1870, was incorporated in section 1963 of the Revised Statutes, which is as follows:

SEC. 1963. When the lease heretofore made by the Secretary of the Treasury to "The Alaska Commercial Company" of the right to engage in taking

fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July 1, 1870, chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease, to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comforts, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals, for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable.

On March 24, 1874, the following act was passed:

CHAP. 64. An act to amend the act entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy.

Be it enacted, etc., That the act entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy, (1) is hereby amended so as to authorize the Secretary of the Treasury, and he is hereby authorized, to designate the months in which fur seals may be taken for their skins on the islands of Saint Paul and Saint George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island, respectively. (March 24, 1874, 1 Supp. R. S., 6.)

THE POSITIONS TAKEN BY THE PLAINTIFF IN ERROR.

On behalf of the North American Commercial Company it was claimed:

(1) That, although by the express terms of section 3 of the act of July 1, 1870, and of Revised Statutes, 1962, the designation of a maximum number of seals to be taken on each island was limited to twenty years from July 1, 1870, still this designation of a maximum number, with the accompanying provision for a proportionate reduction of rental if the Secretary allowed a maximum of less than 100,000, applied to all subsequent leases as well; and if the 7,500 skins actually received and shipped during 1893 by the lessee were taken under the lease the United States could recover rent only in the proportion of a catch of 7,500 to a total catch of 100,000, and the rental should be reduced accordingly. In making this reduction the lessee claimed that both the specified "annual rental" of $60,000 and the "further sum" of $7.62½ for each and every seal skin taken from the islands should be deemed rental, and should be reduced according to the rule contended for (Answer, Sub. Third, R., fol. 39). It therefore tendered to the United States before action brought $23,789.50 (see Answer, R., fols. 52, 53).

(2) That the *modus vivendi* operated as a total suspension of the benefits of the lease; that by reason thereof the United States prohibited the lessee from taking any skins *under the lease* during the season of 1893, and that, therefore, the complaint should be dismissed.

(3) The defendant's counterclaim (Answer, R., fols. 46–55), is based upon the *modus vivendi* or treaty of 1892, the claim being that this treaty was a breach of contract by the United States; that 30,000 seals could have been taken, but the United States, pursuant to the treaty, allowed the lessee only 7,500, to the damage of the lessee in the sum of $283,725.

THE POSITIONS TAKEN BY THE DEFENDANT IN ERROR.

For the United States, now the defendant in error, it was contended that the provisions of section 3 of the act of July 1, 1870, afterwards section 1962 of the Revised Statutes, prescribing a maximum number of seals to be taken in each year upon the islands of St. Paul and St. George, were, by the express terms of those statutes, limited to twenty years from the 1st day of July, 1870. After that date there was no maximum limitation by statute restricting the number of seals which could be taken annually upon these islands. It was contended further for the United States that the proviso in section 3 of the act of July 1, 1870, repeated in Revised Statutes, 1962, to wit, "*but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper,*" was also limited to twenty years by the same statute, being inseparable from the principal clause of the sections in which it was enacted. Furthermore, it was contended for the United States that by an act of Congress passed on March 24, 1874 (1 Supp. R. S., p. 6), the maximum-number provision of section 3 of the act of July 1, 1870,

and of Revised Statutes, 1962, was repealed, and a discretionary power was vested in the Secretary of the Treasury to designate the number of seals to be taken on or about each island, respectively.

According to the contention of the United States, under this present lease it was left to the Secretary of the Treasury to determine the maximum number of seals to be taken by the defendant in any year, *and the covenants of the lease were made to conform to this view of the Secretary's power*, the lessee expressly agreeing not to kill in any year a greater number of seals than is authorized by the Secretary of the Treasury.

In respect to the effect of the *modus vivendi* upon such a contract as this lease, it was contended for the United States, on the evidence, that the number limited by that treaty, to wit, 7,500 seals, was not binding upon the Secretary of the Treasury, but was adopted by him and assigned by him as the quota which the North American Commercial Company might lawfully take in the season of 1893. It was argued also that if the Secretary's power to fix the number to be taken was suspended by the treaty, the lessee did take, accept, and retain these 7,500 skins as, at least, a partial quota under the contract. The circuit court rejected the former but approved the latter proposition.

The Government contended also that on no permissible view of the lease and statutes can the lessee obtain a reduction of the royalty of $7.62½ for each and every fur-seal skin shipped by it from the islands.

The difference is very great in the amount of reduction. On the lessee's theory the Government would

receive $23,789.50. By confining the reduction to the specified rental the Government would receive:

Rent, 7,500 skins at $0.60	$4,500
Royalty, 7,500 skins at $7.62½	57,187
Tax, 7,500 skins at $2	15,000
Total	76,687

THE SET-OFF OR COUNTERCLAIM.

The counterclaim is based on the alleged effect of the *modus vivendi* upon the lease. As, of course, no affirmative recovery on a counterclaim can be allowed against the United States, the question becomes one in respect to the right of the lessee to set off its damages against the sum which the United States is entitled to recover.

The circuit court held that the treaty was a breach of the contract entitling the lessee to damages; that even a claim of such a nature as to depend upon discretion and the exercise of judicial judgment was within Revised Statutes, 951, but that the conditions of that section in respect to the presentation of the claim to the accounting officers of the Treasury had not been complied with, and that, therefore, the lessee could not set off the demand, but must bring an action pursuant to law.

On this point it was contended for the United States:

A. There can be no set-off against the United States in actions at law in which it is plaintiff except under Revised Statutes, 951. The claimant, who has not complied with the conditions of that section or whose claim is not within its scope, must have recourse to a separate action.

B. The demand set up as a counterclaim was never presented to the accounting officers of the Treasury and

was never disallowed by them, as required by Revised Statutes, 951.

C. Allowance of credits under Revised Statutes, 951, can be had as a set-off against the United States only in cases where the damages are liquidated. Unliquidated damages can be recovered only by a resort to Congress, or, in a proper case, to the Court of Claims, or, under the Tucker Act, upon strict compliance with its jurisdictional requirements in the circuit and district courts, or by means of the method of compromise provided for in section 3469, Revised Statutes.

THE DECISION OF THE CIRCUIT COURT.

The findings and opinion of the court show that the court fully adopted the Government's theory in repect to the true construction of the lease, namely, that the provisions of section 3 of the act of July 1, 1870, reenacted in Revised Statutes, 1962, prescribing a maximum number of seals to be killed on each island, and providing that for any reduction of the number by the Secretary a proportionate reduction of rent should be made, were limited to twenty years from July 1, 1870, and have no application to the lease made in 1890 to the North American Commercial Company.

The court found, also, that the lessee did take, receive, and retain the *skins* of 7,500 seals and did cooperate with the Government agents in selecting the seals to be killed, and did recognize that these skins were taken by it *under the lease* by paying to the natives the sum of 50 cents per skin, fixed by the Secretary pursuant to the power reserved to him in the contract (twelfth finding).

Having determined this, it was left for the court to fix the value of this part ~~of the~~ performance and to consider the lessee's claim for damages.

The court found on conflicting evidence that 20,000 seals could have been taken during the year 1893 without detriment to the fishery, and assumes that the Secretary would have allowed this number had the discretion vested in him by the lease not been suspended by the treaty. (Thirteenth Finding, R., fols. 132, 133.)

Assuming 20,000 seals as full performance by the Secretary, and applying to that number the full rental, tax, and royalty according to the terms of the lease, the court finds that such full performance would have entitled the United States to $252,500, or $12.62½ for each of 20,000 skins. The partial performance accepted by the lessee amounted, therefore, to 7,500 skins at $12.62½ each, in all $94,687.50.

From this, therefore, the first conclusion of law (R., fol. 141) necessarily followed, to wit, that the lessee was liable for that sum with interest.

The court having decided that the lessee had accepted as a partial performance of the contract by the Government the 7,500 skins allowed by the *modus vivendi*, necessarily on its theory of the case, treated the action of the Secretary and the United States under that treaty in restricting the catch, not as a bar to the action entitling the plaintiff in error to a dismissal of the complaint, but as a breach of contract to be compensated in damages.

The court found that the market value of skins in 1893 was $24 each, and that if the lessee had received

permission to take 20,000 skins, the net results, deducting the additional payments which would have been due the Government, would have amounted to $142,187.50. But the court held also that the lessee could not set off any part of this sum against the amount the United States was entitled to receive, because the only authority for set-off against the United States in actions by it was under Revised Statutes, 951, with the terms of which the lessee had not complied. (Findings Sixteen and Eighteen, R., fols. 137–140.)

Judgment was therefore rendered for the United States for the sum which the court found the lessee owed for the 7,500 seal skins taken by it, and the lessee was relegated to the Court of Claims to prosecute there its demand for damages.

REASONS WHY THE WHOLE CAUSE SHOULD BE BROUGHT TO THE SUPREME COURT.

The foregoing statement shows that the question involved in respect to the lease and the statutes are not peculiar to this action alone, but affect all the other pending actions and the whole unexpired term of the lease. Several millions of dollars are therefore involved.

Only one question in the case at bar is peculiar to this action; that is, the effect of the *modus vivendi* of 1892 on the obligations of the parties under the lease. The *modus vivendi*, however, expired in October, 1893, and has no application to subsequent years. But the whole question of the rights of the Government and its lessee, and of the revenue which the former is lawfully entitled

to receive, depends on the construction to be given to the lease and the statutes hereinbefore quoted. The lease is still in force, and the lessee is annually taking large numbers of seals and will undoubtedly continue to do so during the term of the lease. But the difference between the parties is so great that no amount that the Secretary of the Treasury will accept will be tendered by the lessee until the final decision of the question of construction by the Supreme Court. Unless, therefore, the Supreme Court orders the whole cause to be sent up now the controversy may be protracted for years.

The cause is one in which an appeal to the Supreme Court lies as a matter of right. The amount involved exceeds $1,000, and the subject of the action is not within the final jurisdiction of the circuit court of appeals. Should there be a reversal by that court, the Government must go back for a new trial, because the order of reversal will not in any probability be a final determination, but will order a new trial. Should there be an affirmance, the lessee will undoubtedly appeal to the Supreme Court. Should the cause be determined on the incidental question of the set-off alone, either in the circuit court of appeals or the Supreme Court, or in both, the Government must proceed to try another action to which the *modus vivendi* does not apply before the construction of the lease and the statutes will be determined and the rights of the parties settled. Thus years may elapse before the Government receives any revenue from this valuable public property, while the indebtedness of the lessee to the United States, already very great, will go on climbing up into millions.

The reasons for granting the application may be summed up as follows:

(*a*) In view of the nature of the action.

(*b*) The very large amount of money involved.

(*c*) The desirability of preventing multiplicity of actions and much needless litigation.

(*d*) The desirability of preventing the same action from being brought to the Supreme Court repeatedly.

(*e*) The difficulty of deciding properly and finally even the single question certified to this court unless the court has the whole record before it.

(*f*) The importance of the public question involved to the executive branch of the Government.

Enough has already been stated in respect to (*a*) the nature of the suit, (*b*) the amount of money involved, (*c*) the multiplicity of actions and the needless litigation which will ensue if the controversy is protracted, and (*d*) the desirability of preventing the same action from being brought to the Supreme Court repeatedly.

(E.) *The difficulty of deciding properly even the question certified on the certification and statement of facts prepared by the circuit court of appeals.*

It will appear that it is not improbable that on this certificate the Supreme Court may decide the question certified in one way, and make a contrary decision on that very question when the whole record eventually comes before it.

The circuit court of appeals for the second circuit on its own motion certified the question of the allowance of

the counterclaim to this court, and prepared the certification papers. It is submitted that the statement of facts does not contain all the material facts necessary for a final determination of the question whether the set-off should be allowed. The question certified itself is very broad:

> Is defendant entitled to set-off or recoup against plaintiff's claim to recover under the lease for the skins taken in the year 1893, whatever damages defendant sustained by reason of any breach of contract by plaintiff occurring during the same year, when such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim, as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff?

But it is submitted that if this court should determine the question upon the certificate, the case may be brought, immediately after the circuit court of appeals has followed this court's instructions, to this court again, on writ of error, and a different conclusion reached upon the original record in regard to the set-off.

(1) The statement of facts is silent as to the question of the amount of damages which the circuit court determined was due to the defendant from the United States, although it states that the claim presented to the Secretary of the Treasury was for $283,725. The Record shows that the amount which the court awards to defendant on account of this breach of contract was $142,187.50. (Transcript of Record, p. 45.) The question thus arises whether, even if presentation to and disallowance of the claim by the Assistant Secretary of the

Treasury would be a sufficient compliance with Revised Statutes 951, it would be a sufficient compliance with that section to present a claim for $283,725 and secure its disallowance where the party is entitled to only $142,187.50.

(2) The statement of facts is silent on the question whether the letter making this claim was or was not accompanied by a statement of items and vouchers bearing upon it, yet it has been held that there is no adequate compliance with Revised Statutes, 951, without such statement of vouchers and items. (*Watkins* v. *United States*, 9 Wallace, 759; *United States* v. *Lamon* (supreme court District of Columbia), 3 McArthur, 204.) The Record shows that there were no such accompanying statements of items or vouchers.

(3) The statement of facts is silent as to the nature of the claim presented, and contains no particulars from which it can be made to appear whether or not the claim setting forth the breach of contract is an "account" within the meaning of Revised Statutes, 951. Claims for unliquidated damages, the United States contend, are not "accounts." It was vigorously contended on behalf of the United States in the circuit court of appeals that the accounting officers, and consequently also the circuit court, under Revised Statutes, 951, have no jurisdiction to pass on any claims except "accounts" in the technical sense of the term, and numerous authorities were cited in support of this proposition. (*United States* v. *Buchanan*, 8 Howard, 83; *Power* v. *United States*, 18 C. Cls. R., 275; *McClure* v. *United States*, 19 C. Cls. R., 179, 180;

Dennis v. *United States*, 20 C. Cls. R., 119; *Brannen* v. *United States*, 20 C. Cls. R., 212, 223; *United States* v. *Robeson*, 9 Peters, 319, 325; *United States* v. *Williams*, 5 McLean, 133.)

(4) More fundamental is the fact already alluded to, that the statement of facts does not state wherein the breach of contract by the United States consisted. The findings of fact of the circuit court are more explicit, and show that it was held to have arisen from the *modus vivendi* already referred to and compliance on the part of the Secretary of the Treasury with its terms. In order to render the Government liable to respond in damages for such alleged breach of contract the court must hold that the Government is liable in damages for its promulgation and enforcement of a treaty designed to settle international controversies and to regulate and preserve the seal fisheries of the United States, because a contract which the Government as fiscus may have negotiated may incidentally have been partially broken.

It is unnecessary to urge that this is a serious question and a different conclusion may be arrived at from that which Judge Wallace reached. (Transcript of Record, pp. 32–33.) (Compare Deming's Case, 1 C. Cls. R., 190; Jones & Brown's Case, 1 C. Cls. R., 383; *Wilson* v. *United States*, 11 C. Cls. R., 513; *Stone* v. *Mississippi*, 101 U. S., 814; *Menken* v. *City of Atlanta*, 2 Southeastern Rep., 559, 564; *Dunham* v. *Lampheare*, 3 Gray, 260; *Smith* v. *Maryland*, 18 How., 71; *Gibson* v. *United States*, 166 U. S., 269.) Yet if the Government is not liable to respond in damages in such a case as this, the question of the manner and mode of presenting the

defendant's claim to the accounting officers under Revised Statutes, 951, becomes wholly immaterial.

(5) Nor is it easy to see how the question of the amount of rentals and other sums due to the Government under the lease can be separated from the question of the amount of defendant's damages for the alleged breach of contract by the United States, even to the extent of extinguishing the former sum by setting it off against the latter. Judge Wallace, in the circuit court, in determining the amount due to defendant for breach of contract by the Government, sought to ascertain the amount of profits which defendant would have made on the 12,500 additional seals it would have taken. (Transcript of Record, p. 45.) He ascertained the amount by deducting from the average estimated market price of such 12,500 seals the amount which defendant would have been obliged to pay to the Government on account of them, *on the Government's construction of the lease*, which he adopted. Thus he considered the two questions, the so-called main question and the question of the counterclaim, inseparable.

(6) Attention may also be directed to the erroneous impression that may be derived from the assumption in the question certified in the language—

> When such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff.

This suggests that in fact no affirmative judgment is asked against the United States. If the demand of an affirmative judgment be deemed a material circumstance,

reference to the transcript of the Record shows that an affirmative judgment was demanded by defendant (p. 19). This claim in favor of defendant is expressly described as a counterclaim, not merely as a set-off, and the prayer for judgment in the answer is "judgment dismissing said complaint with costs, and for said sum of $283,725, with interest thereon from the 1st day of June, 1894, and costs." It is true, however, that defendant's counsel, on the trial and in the circuit court of appeals, admitted that it could not enter an affirmative judgment against the United States in this action.

In preparing the "statement of facts," the circuit court of appeals no doubt eliminated many of these questions with a view to simplifying the question of law on which it requested instructions from this court. The result may, however, be that this court will answer the question certified in a certain way, and immediately afterwards, on writ of error to review the action of the circuit court of appeals after such instructions were rendered, will be bound to decide the question of the counterclaim differently, because of the additional facts omitted from the "statement of facts," which may make the question certified wholly immaterial. It appears to have been on this principle that this court required the whole record and cause to be sent up to it for consideration, in the case of *Northern Pacific Railroad Co.* v. *Walker* (148 U. S., 391), in which the cause was disposed of on other questions than those certified by the circuit court of appeals, and without passing on those questions.

(F.) *The importance of the public question involved to the executive branch of the Government.*

The large amount of revenue coming to the Government which is involved in this controversy, a large portion of which is concededly due, has already been referred to. But certainly not less important is the bearing the case has on the policy of the Government relative to the seal fisheries. The fact that the executive department has been engaged in negotiations with Great Britain and other countries looking to the adoption of further restrictive regulations of fur sealing in and about these Pribilof Islands is a matter of public knowledge, as also the fact that an international conference has been agreed upon. It is of great importance to the Government to have it determined whether in the interest of the seal-fishing industry it may adopt regulations designed to protect the seal fisheries, and limiting the catch, without being guilty of a breach of its contract with the North American Commercial Company. The circuit court has decided—and the question is not embraced in the statement of facts accompanying the certificate from the circuit court of appeals—that the United States is answerable in damages for breach of contract for entering into and enforcing such a convention with England, but that defendant must resort to another action to recover the money in default of compliance with Revised Statutes, 951. Closely connected with this is the question of policy, addressing itself to the executive branch of the Government as to what course the Government should take in the matter, in which the

pecuniary return which accrues to the Government under the existing lease is an element to be considered.

It is therefore respectfully submitted that the application should be granted.

A certified copy of the entire record of the case in the circuit court of appeals is filed as part of this application, in compliance with paragraph 2 of Rule 37, paragraphs 1 and 2 of which are as follows:

> 1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it requires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.
>
> 2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish the court with a certified copy of the whole of said record.

The statement of facts and question certified from the circuit court of appeals are already before this court, being case Docket No. 431.

Notice of this application has been given to counsel for plaintiff in error in the circuit court of appeals.

It is also submitted, for the reasons which appear above and in the letter of the Secretary of the Treasury printed in the Appendix, that the case should be advanced on the docket, and assigned for hearing at an early day convenient to the court.

J. K. RICHARDS,
Solicitor-General.

APPENDIX.

United States circuit court of appeals, second circuit.

Present, Lacombe, circuit judge; Shipman, circuit judge; Townsend, district judge.

THE NORTH AMERICAN COMMERCIAL Company, plaintiff in error,
v.
THE UNITED STATES, DEFENDANT IN error.

CERTIFICATION OF QUESTIONS TO THE SUPREME COURT, UNDER ACT OF MARCH 3, 1891.

This case came before this court on May 10, 1897, upon a writ of error, sued out by defendant below, to review a judgment of the United States circuit court, southern district of New York, in favor of the plaintiff below, defendant in error. The judgment was entered June 13, 1896, for $107,257.29, being for $94,687.50, with interest and costs. The case was tried in the circuit court by the court without a jury, under sections 649 and 700 of the United States Revised Statutes, and findings of fact and conclusions of law duly made and filed. The plaintiff below, The United States, took no proceedings to review the judgment of the circuit court by writ of error or otherwise.

Argument being had upon the writ of error, certain questions of law developed, concerning which this court desires the instruction of the Supreme Court for its proper decision.

STATEMENT OF FACTS.

The facts in the case, so far as they bear in any way upon the questions certified, are as follows:

The action is to recover rent for the year 1893 accruing under a lease executed March 12, 1890. By that lease the Secretary of the Treasury, in pursuance of statutes of the United States, leased to the North American Commercial Company (hereinafter styled the defendant), for a term of twenty years from May 1, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of said seals. By the same instrument defendant agreed to pay a certain gross sum as annual rental, and also certain other sums for each fur skin taken and shipped. After the making of said lease defendant entered upon the enjoyment of the right thereby granted; and certain disputes which arose between the parties touching the amounts to be paid by defendant for the years 1891 and 1892 were amicably adjusted between the parties.

The United States during the year 1893 prohibited and prevented defendant from taking any fur seals whatever on said islands, and thus deprived defendant of the benefit of its said lease; but during said year 1893 the United States itself, through agents of the Treasury Department, took upon the said islands 7,500 seals, and defendant was permitted to cooperate in selecting the seals so killed, and to take, and it did take and retain, the skins of those seals; and for the 7,500 skins so taken and retained defendant has not paid.

In consequence of the breach of its contract by the United States during the year 1893 defendant sustained a considerable loss, for which it makes a claim against the Government; and in this action, brought to recover

rent under the contract for the year 1893, it seeks to recoup or set off, to the extent of plaintiff's claim only, the damages it has sustained by reason of plaintiff's failure to carry out such contract during that same year according to its terms.

On November 27, 1895, N. L. Jeffries, attorney for the said defendant, wrote and caused to be sent to the Secretary of the Treasury a letter stating that the said defendant presented the same as its claim for damages against the United States in the sum of $283,725, through the Secretary of the Treasury, to the proper accounting officers of the Department of the Treasury for examination and allowance; and that the said defendant was the lessee under its said lease, a copy of which was stated to be annexed to the said letter, and that by the terms thereof the United States had leased to the said defendant the exclusive right to engage in the business of taking fur seals on the said islands; and also stating the agreements on the part of the said defendant under the said lease, and that it might have taken 30,000 fur seals in the year 1893, and that it was prohibited by the United States from taking any fur seals on the said islands during that year; and that it had incurred large expenses and that it had faithfully performed its agreement, and that by reason of the United States having prohibited said defendant from taking any seals in that year said defendant had sustained a loss in the said sum of $283,725; and also stating that that communication was respectfully submitted for the consideration of the accounting officers of the Treasury Department. On or about December 24, 1895, the Assistant Secretary of the Treasury wrote and caused to be sent to the said N. L. Jeffries, a letter addressed to him as attorney for the said defendant, in which he referred to the said letter of the said Jeffries to the Secretary of the Treasury, dated November 27, 1895, and stated that the claim made by that letter was thereby rejected.

The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States limiting the catch of seals upon the said islands to 7,500, and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident.

QUESTION CERTIFIED.

Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

"Is defendant entitled to set-off or recoup against plaintiff's claim to recover under the lease for the skins taken in the year 1893 whatever damages defendant sustained by reason of any breach of contract by plaintiff occurring during the same year when such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim, as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff?"

In accordance with the provisions of section 6 of the act of March 3, 1891, establishing courts of appeal, etc., the foregoing question of law is, by the circuit court of appeals for the second circuit, hereby certified to the Supreme Court.

E. HENRY LACOMBE, *Circuit Judge.*
N. SHIPMAN, *Circuit Judge.*
WM. K. TOWNSEND, *District Judge.*

JUNE , 1897.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 28, 1897.

The honorable the ATTORNEY GENERAL.

SIR: Inviting your attention to the cause of the United States against the North American Commercial Company, to recover the amount due the Government under the lease to that Company of the right to take fur seal skins on the Pribilof Islands, for the year 1893, in the United States Circuit Court for the Southern District of New York, in which cause judgment was rendered for the plaintiff in the amount of $107,257.29, and an appeal taken by the defendant to the Circuit Court of Appeals for the Second Circuit, I have the honor to call your attention to the fact that no payments have been made on account of said lease since 1892. The amounts now due from the lessee, computed in accordance with the terms of the contract, including the judgment rendered as above stated, aggregate $874,680.66, payment of which cannot be had until the questions at issue are finally adjudicated. Payment of the yearly rentals from the islands accruing from subsequent years will be suspended for the same reason. The covering of this large amount already due into the Treasury, and the receipt at the proper times of the subsequent annual rentals, as they become due, are cogent reasons which move me to desire a speedy determination of the controversy.

From the fact that no moneys have been received from the lease of the islands since 1892, several resolutions of Congress have been addressed from time to time to the Secretary of the Treasury, calling for a statement of the

moneys received on this account, and of the measures which have been taken to secure payment of the annual rentals by the lessee. In view of these resolutions, it is deemed wise to expedite as far as possible the determination of the questions which have arisen, upon which depends the settlement of the account between the Government and the North American Commercial Company.

In addition to the above suit involving the rental for 1893, other suits have been instituted in the same court to recover the rentals for the years 1894, 1895, and 1896, respectively, the amounts embraced in the latter suits being respectively $214,298.37, $204,375, and $348,750.

In view of the facts herein set forth, I have the honor to request that application be made to the Supreme Court of the United States that the whole of the cause for the recovery of the rental for 1893, and if possible, the actions for the rentals for subsequent years, be removed to that Court for determination.

Respectfully yours,

L. J. GAGE, *Secretary.*